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No. 91-1975

In The

Supreme Court of the United States

October Term, 1991

BETHLEHEM STEEL CORPORATION,

Petitioner,

vs.

ALVIN JOEL TYLER,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Second Circuit Court of Appeals, applying New York's Human Rights Law, correctly upheld the district court's instruction to the jury to consider Bethlehem's affirmative defense if Alvin Joel Tyler ("Tyler") proved age was a motivating factor in Bethlehem Steel Corporation's ("Bethlehem") decision to terminate him or refuse to transfer him. .

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STATEMENT OF THE CASE

United States Court of Appeals for the Second Circuit, affirming the district court, found:

> "On June 27, 1986, Janes sent a memorandum to W. T. deHaven, district manager of Bethlehem's Pittsburgh sales office, recommending that Bethlehem shut down the Buffalo sales office. He made a number of other recommendations, including 'Lay off A. J. Tyler (Age 48, twenty-six years service)'. Sawyer testified that age and years of service were factors relevant to Bethlehem's pensions, savings plans, and insurance levels." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1178 (2d Cir. 1992).

Edwin W. Janes ("Janes"), Tyler's supervisor, asserted sales were going down even though he had written a month earlier that sales were going from 118,000 tons in 1985 to 130,000 tons in 1986 and "we are currently booking at about 102% of plan" (990).[1]

The Second Circuit further found:

> "On July 9, 1986, while Tyler was on vacation, Janes called and told him to come into the office the next day to meet with both Janes and Sawyer. At that meeting, Janes and Sawyer informed Tyler that Bethlehem was closing its Buffalo Sales Office for economic reasons; and that Tyler was to be permanently laid off. Tyler asked if there was any possibility of a transfer to the Pittsburgh Sales Office, but Janes and Sawyer said there were no transfer possibilities." 958 F.2d at 1178-1179.

Contrary to Bethlehem's assertion that Tyler was only interested in transfer to Pittsburgh, Tyler testified that he asked Janes and Richard Sawyer ("Sawyer"), Central Region Manager who supervised both Janes and deHaven, about the possibility of a transfer "to Pittsburgh or any place" (137).

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[1] Numbers in parenthesis refer to pages in the Joint Appendix filed with the Second Circuit.

Bethlehem's petition asserts, contrary to Sawyer's testimony and to the Second Circuit, that at the time of Tyler's layoff in July of 1986, there were no vacant sales positions within Bethlehem. The Second Circuit found:

> "In fact, a short time before Tyler's termination, Sawyer had inquired of deHaven about a transfer for Tyler. *Although there was an opening in the Pittsburgh office* at that time, deHaven said he was going to transfer Frank Weber, a 47-year old customer sales assistant, into that position. However, Weber was not transferred, and the Pittsburgh sales position was left vacant until October 1, 1986, when it was given to David Moules, a 26-year old wire salesman with only four years' service .... Thus, Bethlehem fired the 48-year old Tyler after denying his request for a transfer to Pittsburgh, a transfer it soon gave to a relatively inexperienced, disgruntled salesman barely half Tyler's age." 958 F.2d at 1179 [emphasis added].

The Second Circuit's finding mirrors Sawyer's testimony (793-794, 617-618). The record, including Sawyer's testimony and Tyler's work in Pittsburgh for six months prior to this termination supports the conclusion that *there was an opening on July 10, 1986*. No Bethlehem witness or exhibit supports Bethlehem's assertion that there was not.

Bethlehem asserted that Tyler was ineligible for transfer, based on the testimony of Daniel Land ("Land"). Sawyer testified, contrary to Land, that Land did not make transfer decisions (820-821). Those decisions were made by Sawyer's superior, Richard Boulinger ("Boulinger") together with Adams Moore (821). At the time of Tyler's layoff, Sawyer had told Boulinger about Tyler's performance improvement (824-825). According to Sawyer, Boulinger knew that Tyler was a very good salesman and was eligible for transfer at the time of his layoff.

Sawyer testified that deHaven selected David Moules ("Moules") instead of Tyler for the transfer to Pittsburgh (828-

830). Sawyer accepted deHaven's evaluation and recommendation, and made no independent evaluation himself (828). DeHaven never testified during the trial, and the court gave the jury an adverse inference instruction (948). Contrary to Bethlehem, there is no evidence why deHaven transferred Moules. Under the circumstances, the jury could conclude that it was Tyler's age which caused Moules to be selected.

The Second Circuit made the following findings about Bethlehem's transfer practices at the time of Tyler's layoff:

> "Between July 1986 and November 1987, Bethlehem transferred a total of 13 sales people all of them younger than Tyler. One of the two oldest was Weber, who finally gained the Pittsburgh sales position when Moules quit. In making its transfer decisions, Bethlehem relied on several factors, one of which was the performance appraisal, several of which referred to the employees' 'youth' in a positive manner. One candidate, 25 years old at the time was given the following accolade:
>
> All indications point to 'Young Tiger' classification. We will continue to follow closely; feel we have a future 'High Potential' individual here."

After Tyler was fired, Bethlehem hired 12 new sales representatives and put them through Bethlehem's training program. Ten of the 12 were hired directly from college campuses. Daniel Land, Bethlehem's manager of sales and marketing administration, explained why:

> "[W]e have had a lot of unplanned attrition during the time period of 1982 to the present. We have seen the demographics of our sales organization shift gradually upwards so that, as I [explained] earlier, some 56, 57 percent of our sales force is now between the ages of 45 and older. *** [W]e are providing for the time when our sales force continues to age and gets to be — a greater percentage of them that are currently eligible for retirement than become eligible for retirement." 958 F.2d at 1179.

SUMMARY OF ARGUMENT

The Second Circuit decided this case entirely under New York law. Because the Second Circuit did not interpret any federal statute, no federal question was raised. Bethlehem's assertion that "direct evidence" means non-"circumstantial" evidence is erroneous. The Second Circuit correctly concluded that "direct evidence", in an employment discrimination context, means evidence which does not rely on an inference created in accordance with *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973).

The Second Circuit correctly concluded that if a plaintiff produces evidence from which a reasonable jury could conclude adverse employment consequences were "because of" an impermissible factor, an employer affirmative defense instruction was proper. This conclusion is consistent with this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and with most circuit panels. Those few who have ruled otherwise have incorrectly read "direct evidence" to mean non-"circumstantial" evidence.

Bethlehem's assertion that evidence of discriminatory salesman transfer and hiring practices are "discrimination in the air" unrelated to Tyler's termination is based on its false statement of evidence. Bethlehem asserts, contrary to the Second Circuit and record evidence, that there were no salesman openings when Tyler was terminated. Contrary to Bethlehem, there was at least one opening and the jury correctly concluded that Tyler was denied transfer to it because of Bethlehem's discriminatory practices.

Bethlehem's attorneys could not reasonably believe this Court would grant certiorari to review the Second Circuit's interpretation of New York law based in part on federal caselaw. Similarly Bethlehem's attorneys could not reasonably believe this Court would grant certiorari to review the Second Circuit's evidentiary

conclusions, especially where Petitioner's evidentiary assertions are not supported by any record evidence. Thus damages are appropriate.

ARGUMENT

I. The Second Circuit's decision is based entirely on state law, so it is inappropriate for review.

The Second Circuit noted:

> "While this action was commenced as a diversity action under New York's Human Rights Law, see N.Y. Exec. Law §§290-301 (1982 and Supp. 1992), both parties agree that the elements of proof of liability for a case commenced under §297(9) have been the same as those required under the Federal Age Discrimination in Employment Act ('ADEA'); New York courts have consistently looked to federal caselaw in expounding the Human Rights Law .... For this reason, we may analyze the jury instruction issue as if it were a case commenced under the ADEA or title VII." 958 F.2d at 1180.

Thus the Second Circuit used principles derived from federal employment discrimination caselaw to evaluate the district court's New York's Human Rights Law jury instructions.

This Court has regularly accepted interpretations of state law in which the district court and the court of appeals have concurred. In *Bishop v. Wood*, 426 U.S. 341 (1976), a former police officer asserted he had a property interest in his job since he was a permanent employee. This Court noted that on its face the ordinance on which the police officer relied could fairly be read to create a guarantee of continuing employment. Accepting the contrary statutory interpretation of the district court and court of appeals this Court stated:

> "In comparable circumstances, this Court has accepted the interpretation of state law in which the district court and the court of appeals have concurred even if an examination of

> the state law issue without such guidance might have justified a different conclusion." 426 U.S. at 347.

The decision should be no different in this case. The Second Circuit has done no more than to conclude, under the facts and circumstances of this case, that the correct New York jury instruction included an instruction with regard to Bethlehem's affirmative defenses.

Because this case involved no question of federal law, the Second Circuit was not required to decide what the outcome would have been had the case been brought under ADEA. Thus it is distinguishable from such cases as *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), where the state court was required to determine whether a drug had been "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act. In this case, the principles applied by the Second Circuit are not derived from any federal statute. They are derived from federal decisions on how discrimination can be proved.

The Second Circuit concluded that if Tyler's case had been tried in a New York court, New York law would have required an instruction on Bethlehem's affirmative defense. Bethlehem's liability was not dependent on whether a similar instruction would have been appropriate under ADEA. Because this case raises no issue of federal law, it is not appropriate for certiorari.

II. The Second Circuit's analysis of the district court's jury instruction is consistent with *Price Waterhouse v. Hopkins* and with decisions in other circuits.

Bethlehem asserted to the Second Circuit that the phrase "direct evidence", as used in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), 109 S.Ct. 1775, meant non-"circumstantial" evidence. 958 F.2d at 1183. In fact the phrase "direct evidence" has never meant non-"circumstantial" evidence in employment discrimination law.

In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court stated that plaintiff could win her case in one of two ways:

> "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U.S. at 804–805 ...." *Id.* at 257.

Thus "direct evidence", in an employment discrimination context, is evidence which does not rely on an inference created in accordance with *McDonnell Douglas Corp. v. Green*, *supra*.

Once it is clear that "direct evidence" is any evidence, including circumstantial, which does not rely on a *McDonnell Douglas* inference, much of the confusion to which the Second Circuit referred is eliminated. Justice O'Connor's carefully worded concurrence in *Price Waterhouse v. Hopkins* uses the phrase "direct evidence" to mean evidence not requiring a *McDonnell Douglas* inference. Confusion among the circuits has arisen solely because some panels have read the phrase to mean non-"circumstantial" evidence. Justice O'Connor states:

> "In my view, in order to justify shifting the burden on the issue of causation to the defendant, a dispirit treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." 109 S.Ct. at 1804.

The Second Circuit adopted Justice O'Connor's formulation in this case.

The Second Circuit noted that Judge Curtin told the jury Tyler had to prove that age was a "motivating factor" and concluded:

> "To summarize and repeat: *Price Waterhouse* does not require, in a jury trial, 'direct evidence' of discriminatory animus (at least not in the sense of 'direct' and 'circumstantial' evidence). What is required is simply that the plaintiff sub-

> mit enough evidence that, if believed, could reasonably allow a jury to conclude that the adverse employment consequences were 'because of' an impermissible factor." 958 F.2d at 1187.

This statement of the law is nearly identical to Justice O'Connor's statement and is in no way inconsistent with decisions among the circuits, except those few decisions which mistakenly conclude that direct means non-"circumstantial".

III. The Second Circuit's factual analysis of Bethlehem's discriminatory transfer is supported by record evidence; Bethlehem's analysis is supported by none.

Bethlehem asserts that its policy of hiring new college graduate sales trainees to bring down the average age of its sales force is not evidence that Tyler was discriminated against. Similarly, Bethlehem argues that reliance, when making transfers on performance appraisals which categorized some transferees as "young tigers" is also not evidence that Tyler was discriminated against. These assertions are based on Bethlehem's unstated premise. The premise, with no factual support, that because there were no sales jobs to which Tyler could have transferred, he was unaffected by Bethlehem's youth preference in making transfers or filling sales jobs.

Contrary to Bethlehem, there was ample evidence to support the jury's conclusion that Bethlehem had an opening in Pittsburgh which it denied to Tyler and held open until it could transfer the 26-year old Moules. In evaluating Bethlehem's assertions, the Second Circuit stated:

> "To reverse, we must be satisfied, without benefit of credibility findings, that the evidence is so one-sided and contrary to the jury's verdict that there is only one reasonable conclusion as to proper judgment." 958 F.2d at 1187.

Evidence of an opening in Pittsburgh on July 10, 1986 included

Sawyer's testimony that he asked deHaven about transferring Tyler to that opening before he was laid off. It also included Tyler filling the opening on a one week a month basis for about six months prior to his termination. No evidence at all supports Bethlehem's bald assertion that the opening did not exist.

Based on the evidence, the Second Circuit found:

> "Bethlehem fired the 48-year-old Tyler after denying his request for a transfer to Pittsburgh, a transfer it soon gave to a relatively inexperienced, disgruntled salesman barely half Tyler's age." 958 F.2d at 1179.

The Second Circuit then turned to a consideration whether age was a criterion Bethlehem used in making transfers such as the one Tyler was denied.

Analyzing the jury's necessary conclusions in support of its verdict, the Second Circuit held:

> "These conclusions are amply supported by the evidence. Bethlehem's own witness, Daniel Land, testified that Bethlehem's sales force was getting too old; Tyler's layoff helped decrease the average age of Bethlehem's work force. The internal memorandum recommending Tyler's layoff listed his age and years of service. The position which Tyler was filling in Pittsburgh, on a part-time basis, was left unfilled until Bethlehem could place the 26-year-old Moules in it. The performance appraisals of Bethlehem employees who *were* allowed to transfer indicate not only that they were all younger than Tyler, but also that Bethlehem had a special category of employees known as 'young tigers' — an evaluative category from which a long-in-the-tooth employee like Tyler was by definition excluded." 958 F.2d at 1186-1187.

IV. This Court should award Tyler damages.

Bethlehem has petitioned for certiorari in a case decided by the Second Circuit Court of Appeals entirely under New York law. Bethlehem does not assert that the Second Circuit's decision was

so clearly erroneous as to require the exercise of this Court's supervisory powers. Instead, Bethlehem argues that certiorari is proper because guiding principles from federal decisional law were used to interpret New York's Human Rights Law. This Court has never suggested that certiorari would be granted on this basis, and no attorney could reasonably believe that it would.

Underlying Bethlehem's entire petition is its assertion, contrary to the Second Circuit, that at the time of Tyler's layoff in July of 1986, there were no vacant salesmen positions within Bethlehem. In this case, the Second Circuit affirmed Judge Curtin's refusal to grant judgment n.o.v., so this Court's two court rule applies. In *Goodman v. Luckens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987), this Court stated:

> "What the conduct of the Unions had been and whether they had treated blacks and whites differently were questions of historical fact that Federal Rules of Civil Procedure 52(a) enjoins appellate courts to accept unless clearly erroneous .... The court of appeals did not set aside any of the district court's findings of fact that are relevant to this case. That is the way the case comes to us, and both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task. Nothing the Unions have submitted indicates that we should do so."

Bethlehem's bald assertion that there were no salesmen openings at the time of Tyler's layoff is supported by absolutely no evidence. No one during the entire course of the trial ever contradicted Sawyer's testimony that he asked deHaven if he wanted Tyler for the Pittsburgh opening, that deHaven told him he intended to fill the job with Frank Weber ("Weber"), and that Weber did not fill the job which remained open until the 26-year old Moules was transferred into it.

Bethlehem's attorneys could not reasonably conclude this Court would grant certiorari to review a case decided entirely un-

der New York law simply because some principles from federal decisional law were borrowed as New York's highest court said was proper. Bethlehem's attorneys could not reasonably believe this Court would grant certiorari to review a question of fact both the district court and the court of appeals found against Bethlehem, and especially in the absence of any evidence whatsoever to support Bethlehem's factual assertion. Thus this petition for certiorari is frivolous. It was interposed solely to avoid paying the damages owed to Tyler. For these reasons damages and costs are appropriate.

CONCLUSION

Bethlehem's petition for writ of certiorari to the Second Circuit Court of Appeals should be denied and damages and costs should be imposed on Bethlehem, its attorneys, or both.

DATED: Buffalo, New York
June 17, 1992.

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